LIBRARY
SUPREME COURT, U. S.
FILED
DEC 3 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1043

E. V. WILLIAMS COMPANY, a Corporation, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WILLIAM B. DEVANEY
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

M. R. BROUDY
1740 Virginia National Bank Bldg.
Norfolk, Virginia 23510

Of Counsel:

STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

BROUDY & BROUDY
1740 Virginia National Bank Bldg.
Norfolk, Virginia 23510

PEERS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Argument and Reasons for Allowance of the Writ	7
A. The Board Acted Arbitrarily and in Bad Faith by Suppressing the Ineligibility of Temporary Seasonal Employees, Making Temporary Seasonal Employees Eligible in Its Direction of Election and Accepting an Agreed Eligibility List Which Made All Temporary Seasonal Employees, Including College Students, Eligible and Then Sustaining Challenges of Ten College Students, Out of Thirty-One College Students and More Than One Hundred Other Temporary Seasonal Employees, and by Changing the Boundaries of the Unit After Its Decision and Direction of Election	7
B. Disqualification of Ten College Students Was Discriminatory	11
C. The Court Below Improperly Permitted the Board To Sustain Challenges Contrary to Its Own Determination of Voting Eligibility and the Parties' Pre-election Resolution of Voting Eligibility	13
D. The Court Below Erred in Permitting the Board To Disqualify Ten College Students, Out of Thirty-one College Students Employed and Ten College Students Out of More Than One Hundred Temporary Employees Employed, All of Whom Were Eligible Under the Board's Direction and the Parties' Agreement as to Eligibility	14

Page

E. The Challenge of Ten College Students Voting at Alberta, Virginia, Out of Thirty-one College Students and More Than One Hundred Temporary Seasonal Employees, Raised Issues Which Required an Evidentiary Hearing at the Court Below Erred in Denying the Right to an Evidentiary Hearing 16

F. The Boundaries of a Unit May Not Be Changed After an Election 18

Conclusion 19

Appendix A

Decision of the Court Below 1a

Appendix B

Decision and Order of NLRB 2a

Trial Examiner's Decision 4a

Decision and Direction of Election 6a

Supplemental Decision and Certification of Representative 13a

Board Denial of Review of Supplemental Decision and Certification 22a

TABLE OF AUTHORITIES

CASES:

Atlantic Refining Co., 106 NLRB 1268 (1953) 10

Burnishes v. *NLRB*, 123 U.S. App. D.C. 143, 148, 357 F.2d 822, 827 (1966) 8, 12, 13-14, 15, 18

Carpenters Local v. *NLRB*, 365 U.S. 651, 655 (1961) ..7, 12

Herbert Harvey, Inc. v. *NLRB*, 424 F. 2d 770, 780 (D.C. Cir. 1969) 8, 12, 14, 15, 18

International Ladies' Garment Workers' Union v. *NLRB*, 339 F. 2d 116, 125 (2d Cir. 1964) 12, 13, 15, 17, 18

NLRB v. *Athins & Co.*, 331 U.S. 398, 403 (1947) 7, 9, 12

Page

NLRB v. *Belcher Towing Company*, 284 F. 2d 118, 121 (5th Cir. 1960) 9, 10
NLRB v. *Howrel Publications, Inc.*, 322 U.S. 111 (1944) 9
NLRB v. *Tiche-Goettinger Co.*, — F. 2d —, 75 LRRM 2361 (5th Cir. 1970) 17, 18
NLRB v. *A. J. Tower Co.*, 329 U.S. 324, 330, 333 (1946) 7, 8, 12, 14, 15-16, 17
NLRB v. *Wyman-Gordon Company*, 394 U.S. 759, 766, 767 (1969) 7, 8, 14, 16
Republic Steel Corp. v. *NLRB*, 311 U.S. 7, 11 (1940) .. 7, 12
Semi-Steel Casting Co. v. *NLRB*, 160 F.2d 388, 393 (8th Cir. 1947) 13, 15
Shoreline Enterprises of America, Inc. v. *NLRB*, 262 F.2d 953, 963, 964 (5th Cir. 1959) 8, 10, 13, 15
Southern S.S. Co. v. *NLRB*, 316 U.S. 31, 37 (1942) .. 7
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) 10

STATUTES:

National Labor Relations Act, Section 9(c), 29 U.S.C. § 159(c) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

E. V. WILLIAMS COMPANY, a Corporation, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

E. V. Williams Company, a corporation, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case, entered on October 13, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals on Application for Enforcement of an Order of the National Labor Relations Board, dated October 13, 1970, is not yet reported but is printed as Appendix "A" to this

Petition. The Decision and Order of the National Labor Relations Board (hereinafter "Board"), dated April 30, 1969, 175 N.L.R.B. No. 134, is printed in Appendix "B" to this Petition[1] (A. 2a) and is unofficially reported at 71 LRRM 1268 (1969). The Trial Examiner's Decision, which was adopted by the Board, except as noted in its Decision and Order, is printed in pertinent part in Appendix "B" to this Petition (A. 4a) as is the Decision and Direction of Election (A. 6a) and Supplemental Decision and Certification of Representative (A. 13a).

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1970. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e).

QUESTIONS PRESENTED

1. May the Board through challenges lawfully narrow the bargaining unit it found appropriate in its Direction of Election to exclude ten college students out of thirty-one college students and more than one hundred other temporary seasonal employees?

2. May the Board treat ten college students in a dissimilar manner than other college students and in a dissimilar manner than other temporary seasonal employees?

---

[1] The decision of the Board, applicable portions of Decision and Direction of Election, Supplemental Decision and Certification of Representative and Trial Examiner's Decision are printed as Appendix B hereto and will be referred to herein as "A" followed by the appropriate page number.

3. Where the Board, with full knowledge of the employment of temporary seasonal employees, has made all temporary seasonal employees eligible in its Direction of Election, may the Board permit a party, who has agreed to the eligibility of all temporary seasonal employees, to challenge ten out of thirty-one college students and more than one hundred temporary seasonal employees?

4. May the Board deny a hearing where substantial and material issues are raised by its sustaining challenges of ten college students out of thirty-one college students and more than one hundred other temporary seasonal employees, all of whom were eligible under the Board's Direction of Election and the parties' pre-election resolution of eligibility?

STATEMENT OF THE CASE

On March 20, 1968, Laborers' District Council of Virginia, Local 307, AFL-CIO and International Union of Operating Engineers, Local No. 147, AFL-CIO (hereinafter "Unions") filed a joint petition for a Board conducted election under Section 9(c) of the Act. At the hearing in the representation case, Petitioner, E. V. Williams Company (hereinafter "Williams"), contended that voting eligibility should extend to all employees who were employed for 30 days within the year preceding the eligibility date and those employed during the preceding year and at least 45 days during the 2 years preceding the eligibility date (A. 9a n. 5). The Unions contended that, in accordance with the Board's usual practice, the eligible voters should consist of those employed during the payroll period immediately preceding the date of the direction of election (A. 9a n. 5). The Board found

that the usual eligibility standard was appropriate and, accordingly, held,

> "Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below . . ." (A. 10a) [2]

Williams submitted a list of its employees on the payroll for the week ending July 6, 1968, and the

---

[2] The Board with due deliberation chose to make all temporary seasonal employees eligible, stating:

> ". . . no reason exists to depart from the eligibility formula utilized in the customary case where employers normally have a degree of fluctuation in employment, turnover exists and employment is dependent upon demand or other variables. Accordingly, the eligibility period shall be that immediately preceding the date of this Decision and Direction of Election. Moreover, inasmuch as the election, under our normal procedures, will be conducted at the point of time when high employment may be anticipated a maximum number of employees will be included by utilizing the usual eligibility period." (A. 12a n. 5).

The Board then spelled out the voting eligibility as follows:

> "Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced." (A. 10a-12a).

parties reviewed the list with great care. As a result, 43 names were stricken and 9 names were added. Both unions and Williams initialed each change and each page and it was agreed by the Unions, Williams and the Board that the resulting list would be the eligibility list for the election (A. 14a).

The election was held on August 9, 1968, and the balloting was conducted first at Norfolk, Virginia, and later at Alberta, Virginia. Twenty-one college students voted at Norfolk without challenge; but the Unions challenged the ten college students employed at Alberta, Virginia. (A. 15a)[3] No other temporary seasonal employee was challenged. Because the challenged ballots affected the results of the election, the Board, after an *ex parte* investigation, issued its Supplemental Decision and Certification in which it sustained the challenges of the ten college students because they,

> ". . . are students who do not have any reasonable expectancy of permanent employment with the Employer and do not possess a sufficient community of interest to be included in the unit." (A. 19a).

The Board made no subsequent determination of the eligibility of the twenty-one college students who voted without challenge or of the more than 100 temporary

---

[3] Unions received 142 votes and 122 votes were cast against the Unions. The challenged ballots affected the results of the election. (A. 13a). There was a total of 29 challenges. 10 were the college students; 6 challenges were sustained by agreement of the parties; and 13 challenges were not determined, in view of the disposition of the challenges of the ten college students, because, as a result, the remaining challenges were "insufficient to affect the results of the election" (A 20a). Resolution of the voting eligibility of college students is critical to the results of the election.

seasonal employees, including the twenty-one college students, who voted without challenge.

Williams filed timely Exceptions to the Board's Supplemental Decision and Certification which specifically challenged the cursory nature of the Board's *ex parte* investigation, its refusal to entertain evidence that there were thirty-one college students employed of which twenty-one had voted without challenge; that all thirty-one college students were treated identically and were similarly situated; and that under its Decision and Direction of Election all college students, as well as other temporary seasonal employees, were eligible to vote. By telegram dated October 2, 1968, the Board denied Williams' request for review,

> "AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW." (A. 22a).

Williams refused to bargain with Unions and a charge was filed on December 4, 1968, and a Complaint issued on December 12, 1968. The General Counsel moved for summary judgment which was granted by the Trial Examiner stating,

> "There being no unresolved issues requiring an evidentiary hearing on newly discovered or previously unavailable evidence or special circumstances, the certification of the Board constitutes the law of the case at this state of the proceeding and is binding upon the Trial Examiner. The Motion for Summary Judgment is therefore granted." (A. 6a).

The Board by its Decision and Order of April 30, 1969, adopted the findings, conclusions and recommendations of the Trial Examiner, except his finding that Respondent's refusal to meet with the Unions was in bad faith. (A. 2a-3a).

ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT

Petitioner relies upon the following reasons why the petition for a writ of certiorari herein should be granted:

A. The Board Acted Arbitrarily and in Bad Faith by Suppressing the Ineligibility of Temporary Seasonal Employees, Making Temporary Seasonal Employees Eligible in Its Direction of Election and Accepting an Agreed Eligibility List Which Made All Temporary Seasonal Employees, Including College Students, Eligible and Then Sustaining Challenges of Ten College Students, Out of Thirty-One College Students and More Than One Hundred Other Temporary Seasozal Employees, and by Changing the Boundaries of the Unit After Its Decision and Direction of Election

It is not questioned that the Board has wide discretion to ensure the fair and free choice of bargaining representatives. *NLRB* v. *Wyman-Gordon Company*, 394 U.S. 759, 767 (1969); *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324, 330 (1946); *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 37 (1942). But the Board has no discretion to devise punitive or discriminatory measures. *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 11 (1940); *NLRB* v. *Atkins & Co.*, 311 U.S. 398, 403 (1947); *Carpenters Local* v. *NLRB*, 365 U.S. 651, 655 (1961).

The Board, after a lengthy hearing which concerned only voting eligibility, in its Decision and Direction of Election elected to make eligible all employees employed immediately preceding the date of its Direction of Election, including more than one hundred temporary seasonal employees. Following the Board's Decision and Direction of Election, the parties agreed on an eligibility list which included thirty-one college

students among more than one hundred other temporary seasonal employees.

Both the Board and the Unions, with full knowledge of the employment of large numbers of temporary seasonal employees, including college students, raised no question concerning the eligibility of any temporary seasonal employee during the hearing, the Board with due deliberation made all temporary seasonal employees eligible in its Direction of Election and the parties specifically agreed to the eligibility of all temporary seasonal employees, including college students, by their pre-election resolution of eligibility. To permit the Unions to select ten college students, out of thirty-one college students and more than one hundred other temporary seasonal employees, for challenge and for the Board to bar from voting only the ten college students selected by the Unions was discriminatory, arbitrary, contrary to law, and the decision of the court below sustaining the action of the Board is in conflict with the decisions of the District of Columbia Circuit Court of Appeals in *Burinskas* v. *NLRB*, 123 U.S. App. D.C. 143, 148, 357 F. 2d 822, 827 (1966), and *Herbert Harvey, Inc.* v. *NLRB*, 424 F. 2d 770, 780 (D.C. Cir. 1969); the refusal of the Board to apply the same standard of eligibility, or inelegibility, to all thirty-one college students was, under the facts of this case where both the Board agents and the Unions, which benefitted from the Board's refusal to entertain the issue, knew of the employment of temporary seasonal employees, including college students, and suppressed their ineligibility in the Direction of Election and in the agreed eligibility list, improper and the decision of the court below sustaining the order of the Board

is in conflict with the decision of this Court in *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324, 333 (1946); and the decision of the court below is contrary to the principles laid down by this Court for a fair and free choice of bargaining representatives in, *inter alia*, *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944); *NLRB* v. *Atkins & Co.*, 331 U.S. 398 (1947), and *NLRB* v. *Wyman-Gordon Company*, 394 U.S. 759 (1969). In addition, the disqualification by the Board of ten college students was based solely on the fact that they "do not have any reasonable expectancy of permanent employment with the Employer." Application of such standard means that no college student holding summer employment can ever be eligible to vote in any NLRB representation election. Such limitation is impermissible and is in conflict with the decisions of the Court of Appeals for the Fifth Circuit Court of Appeals in *Shoreline Enterprises of America, Inc.* v. *NLRB*, 262 F. 2d 933, 944 (5th Cir. 1959), and *NLRB* v. *Belcher Towing Company*, 284 F. 2d 118, 121 (5th Cir. 1960), and, to the extent that the court below has restated the ruling of the Board,[4] the decision of the court below is contrary to the record, and the

---

[4] The decision below states,

> "The students were ruled ineligible to vote because they were temporary or casual summer employees *lacking both* reasonable expectancy of permanent employment with the Company and sufficient community of interest to be included in the unit." (Appendix A. p. 1a) (Emphasis supplied).

The Supplemental Decision and Certification of Representation stated,

> "... these 10 voters are students who do not have any reasonable expectancy of permanent employment with the Employer and do not possess a sufficient community of interest to be included in the unit." (A. 19a).

disqualification, in any event, is not supported by substantial evidence. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

The Fifth Circuit Court of Appeals in *Shoreline Enterprises of America, Inc., supra*, set forth the test for voting eligibility as follows:

> "Eligibility to vote depends on whether an employee is sufficiently concerned with the terms and conditions of employment in a unit to warrant his participation in the selection of a collective bargaining agent." (262 F. 2d at 944)

The Fifth Circuit followed, and applied, this test in *Belcher Towing Company, supra*, as had the Board, in determining the eligibility of two college students. Although both college students there involved were held to lack a sufficient community of interest with regular employees to be permitted to vote, it was not solely because they were not permanent employees. Indeed, the Fifth Circuit specifically noted that "Neither the Board nor the general counsel takes the position that under no circumstances can college students holding summer employment be properly considered as members of a bargaining unit. See Atlantic Refining Co., 106 NLRB 1268." (284 F. 2d at 121).

Here, college students were employed and paid on precisely the same basis as full time employees; and there were about 100 to 148 temporary employees, including 31 college students, virtually all of whom, including the college students, worked only during the summer season. Of the ten college students disqualified, one was working his 5th consecutive summer for Williams; four were working for the 2nd consecutive summer and one of these four had also worked during a holiday vacation; one worked only

in 1968 but had applied for work in 1967 but had not been hired because he was then underage; and the remaining four were working their first summer. Williams gives former employees preference in hiring but none of the temporary employees has any assurance of future employment. Only ten college students of the more than 100 temporary seasonal employees were disqualified from voting.

Disqualification of college students, but not other temporary seasonal employees, because they were not permanent employees was arbitrary and contrary to the uncontradicted evidence which showed that college students had a complete community of interest with all other temporary seasonal employees, and were entitled to vote on the same basis as other temporary employees. The sole basis for their disqualification was their lack of permanent employment status.

B. Disqualification of Ten College Students Was Discriminatory

Of the more than one hundred temporary seasonal employees, only ten of thirty-one college students were barred from voting, because not permanent employees. All temporary seasonal employees, including college students, had the same status and the same indefinite promise of future employment. The Board found that Williams gave preference in hiring to former employees and the fact that one of the ten college students, whose votes were challenged, was working his fifth consecutive summer, four were working their second consecutive summer and one of these four had also worked during a holiday vacation clearly establishes a strong expectation and probability of future summer employment. Although it may have been proper for the Board to exclude all temporary employees, the

Board may not single out college students and disqualify only them, and, more particularly, the Board may not single out ten college students from among thirty-one college students employed and disqualify only them. Such disqualification is discriminatory and arbitrary and is in conflict with the decisions of the District of Columbia Circuit Court of Appeals in *Barinskas* v. *NLRB*, 123 U.S. App. D.C. 143, 148, 357 F. 2d 822, 827 (1966), and *Herbert Harvey, Inc.* v. *NLRB*, 424 F. 2d 770, 780 (D.C. Cir. 1969); because the Board and the Unions, with knowledge of the employment of temporary seasonal employees, including college students, suppressed their ineligibility in the Direction of Election and the pre-election resolution of eligibility, the Board's disqualification of ten college students, out of thirty-one college students and more than one hundred other temporary seasonal employees, and the refusal of the Board to apply the same standard to all college students or to all temporary seasonal employees, the decision of the court below in sustaining the action of the Board is in conflict with the decision of this Court in *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324, 333 (1946); because the action of the Board narrowed the Unit found appropriate by the Board in its Decision and Direction of Election, the decision of the court below sustaining the order of the Board is in conflict with the decision of the Second Circuit Court of Appeals in *International Ladies' Garment Workers' Union* v. *NLRB*, 339 F. 2d 116, 125 (2d Cir. 1964); and, because the disqualification constitutes a penalty, it is contrary to law and is in conflict with the decisions of this Court in *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 11 (1940); *NLRB* v. *Atkins & Co.*, 331 U.S. 398, 403 (1947); *Carpenters Local* v. *NLRB*, 365 U.S. 651, 655 (1961).

C. The Court Below Improperly Permitted the Board To Sustain Challenges Contrary To Its Own Determination of Voting Eligibility and the Parties' Pre-Election Resolution of Voting Eligibility

After three days of hearings, the Board issued a Decision and Direction of Election and ordered that:

> "Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below . . ." (A. 10a).

The hearing had concerned only voting eligibility of employees. The Board, with full knowledge of the employment of temporary seasonal employees, specifically made temporary seasonal employees then employed eligible to vote. The decision of the court below sustaining challenges contrary to the Board's pre-election determination of eligibility and contrary to the parties' resolution of voting eligibility is in conflict with the decisions of the Fifth Circuit Court of Appeals in *Shoreline Enterprises of America, Inc.* v. *NLRB*, 262 F. 2d 933, 943 (5th Cir. 1959), and the decision of the Eighth Circuit Court of Appeals in *Semi-Steel Casting Co.* v. *NLRB*, 160 F. 2d 388, 393 (8th Cir. 1947); the decision of the Court below approving the narrowing of the unit found appropriate by the Board in its Decision and Direction of Election is in conflict with the decision of the Second Circuit Court of Appeals in *International Ladies' Garment Workers' Union* v. *NLRB*, 339 F. 2d 116, 125 (2d Cir. 1964); and, in treating ten college students in a manner dissimilar from other college students and other temporary seasonal employees, the decision of the court below is in conflict with the decisions of the District of Columbia Circuit Court of Appeals in *Burinskas* v. *NLRB*, 123 U.S. App. D.C.

143, 148, 357 F. 2d 822, 827 (1966), and *Herbert Harvey, Inc.* v. *NLRB*, 424 F. 2d 770, 780 (D.C. Cir. 1969). In addition, by sustaining challenges of a small fraction of identically situated employees contrary to its own determination of voting eligibility, as well as the parties' pre-election agreement resolving voting eligibility, the decision of the court below subjects the election machinery to abuse and fraud contrary to the decisions of this Court. *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324, 330-331, 333 (1946); *NLRB* v. *Wyman-Gordon Company*, 394 U.S. 759, 766, 767 (1969).

D. The Court Below Erred in Permitting the Board To Disqualify Ten College Students, Out of Thirty-One College Students Employed and Ten College Students Out of More Than One Hundred Temporary Employees Employed, All of Whom Were Eligible Under the Board's Direction of Election and the Parties' Agreement as to Eligibility

The Board made a pre-election determination of voting eligibility which was specifically designed and intended to make eligible all temporary seasonal employees. The parties then agreed upon voting eligibility which encompassed all temporary seasonal employees, including thirty-one college students among more than one hundred temporary seasonal employees. Twenty-one college students voted at Norfolk without challenge, but the Unions challenged the ten college students employed and voting at Alberta, Virginia. No other temporary seasonal employees were challenged.

To sustain challenges contrary to its own determination of eligibility and the parties' pre-election agreement as to voting eligibility is in conflict with the decision of the Fifth Circuit Court of Appeals

in *Shoreline Enterprises of America, Inc.* v. *NLRB*, 262 F. 2d 933, 943 (5th Cir. 1959); the decision of the Eighth Circuit Court of Appeals in *Semi-Steel Casting Co.* v. *NLRB*, 160 F. 2d 388, 393 (8th Cir. 1947); and the decision of the Second Circuit Court of Appeals in *International Ladies' Garment Workers' Union* v. *NLRB*, 339 F. 2d 116, 125 (2d Cir. 1964).

Not only is there no warrant in the Board's Direction of Election or in the parties' pre-election determination of eligibility for narrowing the unit, but to permit one of the parties to arbitrarily select for challenge a portion of a class of voters—temporary seasonal employees collectively or college students collectively—after the remainder of the class has been permitted to vote without challenge, is contrary to the decision of the Second Circuit Court of Appeals in *International Ladies' Garment Workers' Union* v. *NLRB*, *supra*, because to change the boundaries of a unit after the election misleads the voters and subverts the utility and effectiveness of the challenge procedure; in treating ten college students in a dissimilar manner than other college students and other temporary seasonal employees, the decision of the court below is in conflict with the decisions of the District of Columbia Circuit Court of Appeals in *Burinskas* v. *NLRB*, 123 U.S. App. D.C. 143, 148, 357 F. 2d 822, 827 (1966), and *Herbert Harvey, Inc.* v. *NLRB*, 424 F. 2d 770, 780 (D.C. Cir. 1969); the decision of the court below is improper because the ineligibility was suppressed by the Board in its Direction of Election and the agreed eligibility list and the Board refused to apply the standard to all seasonal employees, or even to all college students, contrary to the decision of this Court in *NLRB* v. *A. J. Tower Co.*,

329 U.S. 324, 333 (1946); and the decision of the court below is improper because it prevents a fair and free choice of bargaining representative contrary to the decisions of this Court. *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

E. The Challenge of Ten College Students Voting at Alberta, Virginia, Out of Thirty-One College Students and More Than One Hundred Temporary Seasonal Employees, Raised Issues Which Required an Evidentiary Hearing and the Court Below Erred in Denying the Right to an Evidentiary Hearing

Unions challenged only the ten college students working and voting at Alberta, Virginia, and permitted to vote without challenge twenty-one college students working and voting at Norfolk, Virginia, and more than one hundred other temporary seasonal employees. In sustaining the challenges of the ten students because "not permanent employees" the Board acted contrary to its own determination of eligibility as well as the parties' pre-election agreement as to voting eligibility. Williams filed timely exceptions to the propriety of the challenge of ten out of thirty-one college students (and more than one hundred temporary seasonal employees), the inadequacy of the investigation, and requested a thorough and complete investigation to determine the community of interest of temporary seasonal employees. In its *ex parte* investigation of the challenges the Regional Director held no evidentiary hearing and made no finding and no determination of voting eligibility of college students as a class or of temporary seasonal employees as class; and the Board summarily denied a hearing or other investigation on the ground that Williams' request for review of the Supplemental Decision and Certification "Raises No Substantial Issues Warrant-

ing Review." In the unfair labor practice proceeding, Williams was denied a hearing on the ground that all issues involved had been resolved in the prior related representation case and the Trial Examiner, finding no unresolved issues requiring an evidentiary hearing, granted the motion for judgment on the pleadings. The Board adopted the findings, conclusions and recommendations of the Trial Examiner (except that the Board did not find that Williams' refusal to bargain was in bad faith) and the court below granted enforcement of the Board's order.

The order of the court below, granting enforcement of the order of the Board, denies the right to a hearing and determination of substantial and material factual and legal issues (here, *inter alia:* 1. determination of the voting eligibility of college students as a class and or voting eligibility of temporary seasonal employees as a class; 2. repudiation by the Board and by a party of the pre-election determination of voting eligibility; 3. arbitrary disenfranchisement of ten college students, out of thirty-one college students who voted and ten out of more than one hundred temporary seasonal employees, because "not permanent employees"; 4. narrowing of the Board's unit determination, after the election, to exclude some, but not all, college students), is erroneous, and contrary to the decision of this Court in *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324, 333 (1946), and is in conflict with the decisions of the Fifth Circuit Court of Appeals in *NLRB* v. *Titche-Goettinger Co.*, ... F. 2d ..., 75 LRRM 2561 (5th Cir. 1970), and the Second Circuit Court of Appeals in *International Ladies' Garment Workers' Union* v. *NLRB*, 339 F. 2d 116, 125 (2d Cir. 1964).

F. The Boundaries of a Unit May Not Be Changed After an Election

The Board might properly have excluded all temporary employees, or possibly all temporary seasonal employees who were college students, at the time the election was directed. The Board chose, rather, to make all temporary seasonal employees eligible, including college students; and thirty-one college students among more than one hundred temporary seasonal employees were on the agreed eligibility list. The decision of the court below, allowing the Board to change the boundaries of the unit after the election, without notice and without hearing misled the voters and the employer, subverted the utility and effectiveness of the challenge procedure, and made it impossible to know who was within the bargaining unit and such decision is in conflict with the decisions of the Second Circuit Court of Appeals in *International Ladies' Garment Workers' Union* v. *NLRB*, 339 F. 2d 116, 125 (2d Cir. 1964), and of the Fifth Circuit Court of Appeals in *NLRB* v. *Titche-Goettinger Co.*, ... F. 2d ..., 75 LRRM 2561 (5th Cir. 1970); and the treatment of ten college students in a manner dissimilar to the treatment of other college students and other temporary seasonal employees was arbitrary and is in conflict with the decisions of the District of Columbia Circuit Court of Appeals in *Burinskas* v. *NLRB*, 123 U.S. App. D.C. 143, 148, 357 F. 2d 822, 827 (1966), and *Herbert Harvey, Inc.* v. *NLRB*, 424 F. 2d 770, 780 (D.C. Cir. 1969).

CONCLUSION

Petitioner prays, for the foregoing reasons, that the Court should review the questions presented herein.

Respectfully submitted,

WILLIAM B. DEVANEY
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

M. R. BRODDY
1740 Virginia National Bank Bldg.
Norfolk, Virginia 23510

Of Counsel:

STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

BRODDY & BRODDY
1740 Virginia National Bank Bldg.
Norfolk, Virginia 23510

2nd December, 1970

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14,081

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

- VERSUS -

E. V. WILLIAMS COMPANY, *Respondent*.

On Application for Enforcement of an Order of The National Labor Relations Board.

(Argued October 7, 1970 Decided October 13, 1970.)

Before BOREMAN, CRAVEN, and BUTZNER, *Circuit Judges*.

Frank Vogl, Attorney (Arnold Ordman, General Counsel for the National Labor Relations Board, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Nancy M. Sherman and Allen H. Sachsel, Attorneys, on brief) for the petitioner; M. R. Broudy (Broudy and Broudy on brief) for respondent.

PER CURIAM:

The National Labor Relations Board petitions for enforcement of a bargaining order against the E. V. Williams Company, a road contractor.* The company justifies its

* E. V. Williams Co., 175 NLRB No. 134, 71 LRRM 1268 (1969).

refusal to bargain on the ground that the Board wrongfully sustained challenges to the ballots cast in a representation election by ten college students who were working during the summer. The students were ruled ineligible to vote because they were temporary or casual summer employees lacking both reasonable expectancy of permanent employment with the company and sufficient community of interest to be included in the unit. We find that the Board neither committed procedural error nor abused its discretion in sustaining the challenges to the ballots. NLRB v. Certified Testing Laboratories, Inc., 387 F.2d 275 (3rd Cir. 1967); NLRB v. Joclin Mfg. Co., 314 F.2d 627, 634 (2d Cir. 1963).

The order of the Board will be enforced.

APPENDIX B

Decision and Order

On January 31, 1969, Trial Examiner Ivar H. Peterson issued his Decision in the above entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the Unions and the General Counsel filed answering briefs.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was com-

mitted. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and except as noted, hereby adopts the findings, conclusions and recommendations of the Trial Examiner.[1]

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, E. V. Williams Company, Inc., Virginia Beach, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., April 30, 1969.

FRANK W. McCULLOCH, *Chairman*
JOHN H. FANNING, *Member*
SAM ZAGORIA, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[1] The Trial Examiner properly granted the General Counsel's motion for summary judgment, for the reasons stated by him. In view of the granting of this motion, we do not find it necessary or appropriate to pass on the General Counsel's request for a reaffirmation on the merits of our findings in the prior representation case.

Furthermore, we do not adopt the Trial Examiner's finding that the Respondent's refusal to meet with the Unions was in bad faith, as all that is required to prove a violation is the Respondent's admitted refusal to meet with the certified Unions. *Cf. N.L.R.B. v. Katz*, 369 U.S. 736.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 5-CA-4268

E. V. WILLIAMS COMPANY, INC.

and

LABORERS' DISTRICT COUNCIL OF VIRGINIA, LOCAL #307, affiliated with LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL #147, affiliated with INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

HARVEY A. HOLZMAN, ESQ., for the General Counsel.
STANLEY G. BARR, JR., ESQ. *(Howell, Annonis & Dougherty)*, of Norfolk, Va., for the Unions.

M. R. BROUDY, ESQ. *(Broudy & Broudy)*, of Norfolk, Va., for the Respondent.

Trial Examiner's Decision

Statement of the Case

• • • • • • • • • •

The questions of the validity of the election and certification were decided by the Board in the representation proceeding. It is established Board policy that, in the absence of newly discovered or previously unavailable evidence or special circumstances, litigation before a Trial Examiner in an unfair labor practice case of issues which were or could have been litigated in the prior related

representation proceedings, is not permitted.[3] It seems plain to me that the Respondent's objections to the certification constitutes an attempt to relitigate the Board's determination in the representation case and therefore must fail unless supported by new evidence or special circumstances.

There is no absolute right to a hearing under Section 10(b) of the Act if there are no litigable issues. See *Harvey Campbell Sons' Corporation*, 164 NLRB No. 36 fn. 9, and cases there cited.[4] Nothing sought to be relied upon by Respondent holds to the contrary.

The Trial Examiner has no authority to review the Board's final disposition of the representation proceeding or to question its conclusion based on the existing record. However, the Board's findings are not *res judicata*. The Respondent is free, in exceptions to this decision, to request the Board to reconsider the determinations in the representation case, and, in the event of an unfavorable final order by the Board, the Respondent may request review of those determinations in an appropriate court of appeals.

---

[3] *Howard Johnson Company*, 164 NLRB No. 121; *Metropolitan Life Insurance Company*, 163 NLRB No. 71; See *Pittsburgh Plate Glass Company* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); *N.L.R.B.* v. *Zelrich Company*, 59 LRRM 2177, 2181; *N.L.R.B.* v. *O.K. Van and Storage Inc.*, 297 F. 2d 74 (C.A. 5); Rules and Regulations and Statements of Procedure, National Labor Relations Board, Series 8, as amended, Section 102.67(f) and 102.69(c).

[4] See also the following cases in which the use of summary judgment procedure where no litigable issues appeared has been enforced by the Courts: *Baumritter Corp.*, 386 F. 2d 117 (C.A. 1, 1967); *Puritan Sportswear Corp.*, 385 F. 2d 142 (C.A. 3, 1967); *LTV Electrosystems, Inc.*, 388 F. 2d 683 (C.A. 4, 1968); *Aerovox Corp.*, 390 F. 2d 653 (C.A. 4, 1968); *Neuhoff Bros. Packers, Inc.*, 362 F. 2d 172 (C.A. 6, 1967); *Follett Corp.*, 397 F. 2d 91 (C.A. 7, 1968), 68 LRRM 2474; *Krieger-Ragsdale & Company, Inc.*, 379 F. 2d 517 (C.A. 7, 1967); *E. Z. Davies Chevrolet*, 397 F. 2d 191 (C.A. 9, 1968), 68 LRRM 2228.

It is apparent that the Respondent purposes to follow this course. At this stage of the proceedings, however, in the absence of any newly discovered or previously unavailable evidence, or special circumstances, the Board's disposition of the representation matter is the law of the case and binding upon the Trial Examiner. No newly discovered or previously unavailable evidence has been offered by the Respondent, nor has it alleged any special circumstances to exist.

There being no unresolved issues requiring an evidentiary hearing on newly discovered or previously unavailable evidence or special circumstances, the certification of the Board constitutes the law of the case at this state of the proceeding and is binding upon the Trial Examiner. The Motion for Summary Judgment is therefore granted.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 5 RC 6351

E. V. WILLIAMS COMPANY, INC., *Employer*

and

LABORERS' DISTRICT COUNCIL OF VIRGINIA, LOCAL #307, AFL-CIO, and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL #147, AFL-CIO,[1] *Joint Petitioners*

Decision and Direction of Election

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

[1] The Petitioners' designation appears as amended at the hearing.

The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[2]

2. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within

[2] The E. V. Williams Company, Inc., a Virginia corporation with headquarters in Virginia Beach, Virginia, is engaged in road grading and filling in the Commonwealth of Virginia. The Employer also performs some general construcion in Virginia. During the preceding year the Employer performed services within the Commonwealth on the federal interstate highway system valued in excess of $50,000. During the same period it purchased machinery and parts within the Commonwealth valued in excess of $50,000, which originated outside the Commonwealth valued in excess of $50,000, which originated outside the Commonwealth, which were utilized in such operations. Gasoline and oil purchases within the Commonwealth during this period exceeded $50,000; however, payments for these supplies were made to offices out of the Commonwealth of Virginia. Based upon the Employer's services valued in excess of $50,000 on interstate roads which are essential links in the channel of interstate commerce, as well as its indirect inflow of goods valued in excess of $50,000, the Employer is engaged in commerce within the meaning of the Act and it will effectuate the policies of the Act to assert jurisdiction. *Crow Gravel Co.*, 168 NLRB No. 141; *Madison County Construction Co.*, 115 NLRB 701.

the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.[3]

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by the Employer excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act, as amended.[4]

---

[3] The Employer asserts that the petition should be dismissed on the basis of an improper and an insufficient showing of interest. The Employer contends that the authorization cards which designate the AFL-CIO and/or its appropriate affiliates do not constitute a proper showing of interest because they do not specifically designate the Joint-Petitioners. The Board has held it is immaterial whether the authorization cards indicate a desire for individual or joint representation by the organizations comprising the Joint-Petitioners. *Mid-South Packers, Inc.*, 120 NLRB 495. Further, since the Unions constituting the Joint-Petitioners are affiliates of the AFL-CIO they are encompassed by the designation on the authorization card "AFL-CIO and/or its appropriate affiliates." *General Shoe Corporation*, 113 NLRB 3906.

The Employer further urges dismissal of the petition on the ground that there is an insufficient showing of interest because the unit is substantially larger than that originally sought by Joint-Petitioners. The Employer bases his contention on its argument that the unit encompasses 880 eligible employees in accordance with the Daniels formula (see *Daniels Construction Company*, 133 NLRB 264) discussed below. *The Board has held that where an employer's operations fluctuate, it requires a showing of representation only among employees employed at the time the petition is filed. Higgins, Inc.*, 111 NLRB 797, 798, fn. 2. *As of the date the petition was filed herein, March 20, 1968, the employee compliment was approximately 350, and it has been administratively determined that, based on this figure, the Petitioners have an adequate showing of interest.* Accordingly, the Employer's motions to dismiss on the grounds of inadequacy and/or impropriety in the showing of interets are denied.

[4] The unit appears as agreed to by the parties.

Direction of Election[5]

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject

[5] The Employer contends that the nature of its operations which depend in measure upon the weather involves a fluctuating payroll. It asserts that the same employees return each season, i.e., spring and summer, and have a continuing interest in the employment conditions which exist. It further alleges that its employees are part of a pool of road construction employees in the area utilized by it and other road contractors. On the basis of these contentions, the Employer argues that those eligible, in accordance with the Board's *Daniels* formula, should include the employees on the current payroll, those who were employed 30 days within the year preceding the eligibility date and those employed sometime during the preceding year and at least 45 days during the two years preceding the eligibility date. The Joint-Petitioners contend that the Board's usual eligibility standard is applicable.

Record testimony and the Employer's exhibits reveal that employment, including excluded categories of employees, has fluctuated from 225 to 467 employees between January 1965 and March 1968. The mean number of employees for these 39 months is 366 employees. If six of the 39 months which involved low points are eliminated, the variation is 308 to 467 employees. Considering 1966 and 1967 without the lows of January and February 1967, the variation for the 22-month period is 340 to 467 employees with a mean of 410. The largest one-month change in employment was 368 to 455 constituting a 24 percent change, and there was no greater change for any two-month period excluding the one period January to March 1968 when employment went from 233 to 351.

In the latest case involving *Daniels Construction Company, Inc.*, 167 NLRB No. 159, the evidence indicated a fluctuation of 1182 to 2399 in a four-month period in 1965, and from 1677 to 2494 (a 43 percent change) within a two month period in 1966. The Board found that for the first ten months of 1966 that Company employed 4477 employees, yet the greatest number of employees in any month during that period was 2494. The Board also found that employees were hired for each specific job; there were a substantial number of jobs in a six-state area; many jobs were of

to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also

short duration; there was a minimum amount of transfers from one job to the next job; and preference was given to former Daniels employees in hiring for new projects. Based upon these factors, the Board concluded that "because of the nature of this industry, many employees experience intermittent employment, and may work for short periods of time on different projects." The Board further stated that employees might work for a short period at each of several employers in an area because of material shortages or while waiting for another craft to perform its work. Based upon all of these factors, the Board established the formula previously enumerated. *Daniels Construction Company*, 133 NLRB 264. The Board in the Supplemental Decision and Direction of Second Election at 167 NLRB No. 159, revised the previous eligibility formula to exclude employees who had voluntarily quit or had been terminated for cause.

The Board, however, has not applied the aforementioned eligibility formula to all construction industry cases. It has looked to the facts in each case to determine the applicable eligibility period. Thus in *R. B. Butler, Inc.*, 160 NLRB 1595, which involved a general contractor it utilized the customary eligibility period, and in *Trammell Construction Company, Incorporated*, 126 NLRB 1365, involving a general contractor, it included employees who worked at least 65 days during the year. Looking to the facts in the instant case, 880 employees worked 30 or more days in 1966, 1967 and the first three months of 1968. Of this number 81 were discharged and 426 quit voluntarily (including those whose termination is classified as "unknown" and described on the record as being considered as quits), and three left because of illness or death. Thus, 510 or more than one half of those whom the Employer would have the Board find eligible, are not eligible upon the basis of the Board's most recent *Daniels* decision. Of the remaining 370 employees, 212 were employed as of March 30, 1968, and 158 had been laid off because of a lack of work. Of the 212 there were 125 with more than one year of employment and 81 with more than 90 days but less than one year of employment. Of the 158 laid off employees, 144 had total employment in excess of 45 days. The Employer's total complement in

eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibilty period and their replacements. Those in the military services of the United States may vote if they appear in

---

mid-March was 351 including 50 office and supervisory personnel. The record testimony reveals that the Employer's major operations are conducted in the Tidewater area of Virginia. The jobs are of several years duration (four of the six road jobs exceed 18 months) and employees are moved from job to job. Although the Employer alleged that it recalled former employees when they were needed, record testimony revealed no formal procedure for recall. *The Employer gives former employees or those with experience in the industry preference in hiring.* It tells its present employees of its need for certain classes of employees and its desire to get word to former employees and utilizes newspaper ads. Telephone calls, correspondence and visits are not used by the Employer to seek former employees. In addition, of 35 truck drivers hired in 1967, virtually all came from a private employment agency; and only one or two of the eight truck drivers hired recently were previously employed by this Employer. Among laborers, present employees are asked to send their friends in for work. With reference to the heavy equipment operators such as crane operators, those who leave when work is slack or because of bad weather are told to contact the Employer in March when operations increase. Of the 158 employees with more than one period of employment, 66 were currently employed as of March 30, 1968; 25 had been laid off for lack of work; and 67 were quits or discharges. Based upon the above facts, it cannot be concluded, as in the *Daniels* case, that this Employer utilizes employees for a short period of time *or that there is a considerable group who has a continuing interest in employment conditions who will be denied a right to vote unless a special eligibility period is provided.* In summary the pertinent facts herein are: (1) *58 percent of the employees with 30 or more days of employment during 1966, 1967 and the first quarter of 1968 quit or* were discharged; (2) *of the 158 employees who were laid* off, the likelihood of recall would appear at best to be conjectural because of the Employer's lack of a method of recall; (3) the jobs customarily last two or more years; (4) jobs are in one geographic area; (5) jobs are basically continuous rather than intermittent; (6) the Employer's fluctuations in payroll are not as substantial as those in the *Daniels* case

person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether (or not) they desire to be represented for collective bargaining purposed by LAMONERS'

---

but reflect a gradual build up and stay at the high level except during some winter months; (7) employees are moved from job to job as needed; and (8) employees are not affected by a dependence on other crafts or material shortages as in the *Daniels* case, but instead are basically affected by the weather and the amount of work available. Thus, no reason exists to depart from the eligibility formula utilized in the customary case where employers normally have a degree of fluctuation in employment, turnover exists and employment is dependent upon demand or other variables. *Accordingly, the eligibility period shall be that immediately preceding the date of this Decision and Direction of Election. Moreover, inasmuch as the election, under our normal procedures, will be conducted at the point of time when high employment may be anticipated a maximum number of employees will be included by utilizing the usual eligibility period. Lewis & Bowman, Inc.*, 109 NLRB 796 (involving the construction industry).

An election eligibility list, containing the names and addresses of all the eligible voters, *must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election.* (Submission of sufficient additional copies for all parties would be appreciated.) The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 1019 Federal Building, Charles Center, Baltimore, Md. 21201, on or before July 18, 1968. Under Board directives, no extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

DISTRICT COUNCIL OF VIRGINIA, LOCAL #307, AFL-CIO, and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL #147, AFL-CIO.

Original signed by:
JOHN A. PENELLO
Regional Director, Region 5

Dated *July 11, 1968*
at *Baltimore, Maryland*

Supplemental Decision and Certificaton of Representative

Pursuant to a Decision and Direction of Election [1] issued by the undersigned on July 11, 1968, a secret ballot election was conducted under his supervision on August 9, 1968, with the following results:

Approximate number of eligible voters	311
Void ballots	2
Votes cast for Petitioner	142
Votes cast against participating labor organization	122
Valid votes counted	264
Challenged ballots	29
Valid votes counted plus challenged ballots	293

The challenged ballots affect the results of the election.

No objections were filed to conduct affecting the results of the election or to conduct of the election.

The Challenges

The ballots of 29 voters were challenged during the course of the election.

---

[1] The unit is: "All employees employed by the Employer excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, as amended."

The Employer is engaged in road grading and filling in the Commonwealth of Virginia.

The eligibility period is the payroll period ending Saturday, July 6, 1968.

Group A:

The following 12 ballots were challenged by the Board Agent on the basis that the voters' names did not appear on the eligibility list:

Benjamin Owens	Willie Vennie, Sr.
Ernest Sharpe	Ralph Booth
Henry Jones	Bobby Lee Carter
Arthur S. Pearson	Herman Lee Penny
George Booker Adams	Robert Lewis
Frank L. Williams	Junious Henry Edwards

Group B:

The following six ballots were challenged by the Petitioner on the basis that the voters are supervisors:

C. O. Williams	E. A. Thomas
Anthony Ray Aleman	Robert Vaughan
James Blair	Walter L. Sawyer, Jr.

Group C:

The Employer challenged the ballot of David Liles on the basis that he had been discharged prior to the election date.

Group D:

The following 10 ballots were challenged by the Petitioner on the basis that the voters are temporary or casual employees:

Richard Liles	Clarence W. Gee
Daniel Hopson, Jr.	George Alfred Johnson
Richard C. Orgain	James M. King
Clifton Maurice Wells	Stephen M. Northcut
Keith W. Clark	David L. Barner

The Petitioner contends the 10 voters are school students and they will return to college in the fall to resume their studies. Accordingly, the Petitioner states the 10 indi-

viduals are ineligible to vote and the challenges to their ballots should be sustained.

The Employer considers the 10 individuals eligible voters since their names appeared on the eligibility list and they were actively employed on the day of the election.

William Blair, the project superintendent, states that when these employees were hired he did not inquire about their past work experience or about their future plans. However, he says, some of the employees in question might have told him they were attending school. Blair expects all newly hired employees to work for the Company until each job is completed. The 10 employees work at a project at Alberta, Virginia which will be completed in July 1969.

Edward P. Johnson, the timekeeper, states he interviewed some of the 10 individuals and while doing so he filled out their application forms. One of the questions on the application form asks for the name of the last employer. Johnson states he entered the word "student" on the application form when the applicant informed him this was his status.

Richard Liles

Richard Liles states he worked for E. V. Williams from June 17, 1967 to August 26, 1967. When initially interviewed by the Employer, he stated he would attend Virginia Polytechnic Institute at Blacksburg, Virginia in the fall and that he would quit working in September.

Liles returned to work for Williams on June 17, 1968, and on September 4, 1968, informed his foreman that he would cease working for Williams on September 13 because he was returning to school.

Liles states he is entering his sophomore year at VPI and he does not intend to work for Williams during the current school term. He further states that nothing has

been said by the company or himself about future summer employment.

Daniel Hopson, Jr.

Daniel Hopson, Jr. states he was hired by the Employer on June 7, 1968, as a laborer. Timekeeper Johnson, while filling out the application form, inquired whether Hopson was attending school and Hopson replied "Virginia State College" at Petersburg, Virginia. Hopson states he took the job with the intention to work there only during the summer and to return to college in the fall. Hopson entered his sophomore year on September 13, 1968 and his last day of employment was August 20, 1968.

Richard C. Orgain

Richard Orgain states that when hired by the Employer on June 18, 1968, as a laborer he told Timekeeper Johnson he was going to attend college in the fall. Orgain entered the University of Richmond on September 15, 1968.

He inquired about employment for next summer and was told by his foreman that since the job would be nearing completion in July 1969, "he wouldn't get to work very long." Orgain was not offered a job with Williams for the summer of 1969. At this time he does not know where he will work next summer.

Clifton Maurice Wells

Clifton Wells states he was hired by the Employer on June 17, 1968, as a laborer. He informed Timekeeper Johnson that he had completed high school but said nothing about attending school in the fall. However, Wells states that when hired he intended to go to college and considered the work as summer employment only. Furthermore, in mid-August Wells advised his foreman that he was due at college on September 27, 1968. Wells will attend John Tyler Community College, Chester, Virginia. Nothing

has been said by either the Employer or himself about working during the school term or next summer.

Keith W. Clark

Keith W. Clark states he worked as a laborer for the Employer from June 6, 1967, to September 9, 1967. When hired Clark told Superintendent Blair that he would be returning to the University of Richmond, Richmond, Virginia in the fall. Clark did not work for the Employer during the school term. Blair hired Clark again on June 1, 1968. In late August, Clark, in response to his foreman's injury as to when Clark was going back to college, stated he could work as late as September 7, 1968. Clark has completed two years at the University of Richmond and this fall enters Pharmacy School (Virginia Commonwealth University). As part of his schooling, Clark will be required to work 40 hours a week in a drug store next summer and he so advised his foreman.

Clarence W. Gee

Clarence Gee was employed by the Employer from June 2, 1967 to September 9, 1967, as a laborer. When hired Gee informed Blair that he had completed his freshman year at Elon College in North Carolina. Blair asked Gee if he was going back to school in the fall and Gee replied, "yes."

Gee spoke to Timekeeper Johnson during the 1968 Easter school vacation and was informed he could start work when school ended. At that time Gee informed Johnson he would return to school in the fall.

Gee returned to work for the Employer on June 1, 1968 and stopped working on August 30, 1968. He intends to return to Elon College. Gee did not work for Williams during the school term last year nor does he plan to do so this year. At the present time Gee expects to attend summer classes at Elon next year.

George Alfred Johnson

George A. Johnson states he was hired by the Employer on June 27, 1968, as a laborer. About a month prior to going to work for Williams, George A. Johnson told Timekeeper Johnson that he intended to attend college in the fall. Prior to speaking to Timekeeper Johnson, George A. Johnson had been accepted at John Tyler Community College, Chester, Virginia and Danville Community College.

George A. Johnson has informed his employer that he will work until September 27, 1968, and then will enter John Tyler Community College on September 29, 1968. Neither George A. Johnson nor the Employer has discussed the possibility of George A. Johnson working for the Employer during the school term or again next summer.

James M. King

James King states he was hired by the Employer on June 4, 1968, as a tractor operator. At that time he informed Superintendent Blair that he had been accepted at Danville Community College and that he would attend college in the fall. King subsequently was accepted at John Tyler Community College. He will cease working for Williams on September 27, 1968 and attend college as of September 30, 1968.

Stephen M. Norfleet

Stephen Norfleet states he has worked for the Employer during the past four summers (1964 through 1968). On Friday, August 30, 1968, Norfleet ceased working for the Employer in order to return to the University of Richmond for his senior year.

Norfleet states his foremen knew that he was attending college and he always gave two-weeks notice with the explanation that he was returning to school. He further states he is not sure where he will be employed next summer.

David L. Barner

David Barner states he was hired by Superintendent Ben Cook on June 5, 1967, as a grade checker for the Employer. He informed Cook that he could work only during the summer months as he was entering his sophomore year at Old Dominion College in Norfolk, Virginia. Barner ceased working for the Employer on August 19, 1967. He worked for the Employer also during his 1967 Christmas vacation.

Barner returned to work for the Employer on June 8, 1968, and prior to leaving on August 16, 1968, he informed Cook he was returning to school. Upon being asked by Cook to return next summer, Barner informed Cook he wasn't sure what he would do.

The investigation discloses that upon being hired 9 of the 10 voters listed in Group D above informed the Employer that they were attending college or were about to enter college in the fall. Six of the ten have completed at least one year of college. Their employment which occurs basically during their summer vacation period is of a casual nature. This is confirmed by the fact that five of the voters, in prior years, left the Employer's employ until the following summer when the school year commenced. Only one employee has worked during the school term and that occurred during his Christmas vacation. Most of the 10 voters have already left the employ of the Employer and the remaining few expect to do so shortly in order to attend college. None of the 10 individuals in question plans to work for the Employer during the school semester nor do most of them know where they will work next summer.

Based upon the above, these 10 voters are students who do not have any reasonable expectancy of permanent employment with the Employer and do not possess a sufficient community of interest to be included in the unit.

Therefore, the undersigned finds they are temporary or casual summer employees and thus ineligible to vote in the election.[2]

Accordingly, the undersigned sustains the challenges to the ballots of Richard Liles, Daniel Hopson, Jr., Richard C. Orgain, Clifton Maurice Wells, Keith W. Clark, Clarence W. Gee, George Alfred Johnson, James M. King, Stephen M. Norfleet and David L. Barner.

The Employer contends that Frank L. Williams, Ernest Sharpe, listed in Group A above, and David Liles, in Group C, are ineligible to vote because they were terminated prior to the date of the election. The Employer further contends that Junious Henry Edwards, Ralph Booth and Benjamin Owens, in Group A, are ineligible to vote because they quit their employment with the Company prior to the date of the election.

The Petitioner agrees that the challenges to the ballots cast by these six voters should be sustained.

Based upon the agreement of the parties, the undersigned sustains the challenges to the ballots cast by Frank L. Williams, Ernest Sharpe, David Liles, Junious Henry Edwards, Ralph Booth and Benjamin Owens.

In summary, the undersigned sustains the challenges to the ballots of Frank L. Williams, Ernest Sharpe, David Liles, Junious Henry Edwards, Ralph Booth, Benjamin Owens, Richard Liles, Daniel Hopson, Jr., Richard C. Orgain, Clifton Maurice Wells, Keith W. Clark, Clarence W. Gee, George Alfred Johnson, James M. King, Stephen M. Norfleet and David L. Barner. Since the remaining 13 challenges are insufficient to affect the results of the election, as Joint Petitioners received 142 votes and 122

---

[2] *Sandy's Stores, Inc.*, 163 NLRB No. 95, pp. 4-5; *Brown-Forman Distillers Corporation*, 118 NLRB 454; *Belcher Towing Company*, 122 NLRB 1019.

votes were cast against the participating labor organizations, their resolution is unnecessary. Accordingly, since Petitioner has received a majority of the valid votes cast plus the 13 remaining challenged ballots, it is now appropriate that the election results be certified.

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that Laborers' District Council of Virginia, Local #307, AFL-CIO, and International Union of Operating Engineers, Local #147, AFL-CIO, has been designated and selected by a majority of the employees of the above-named Employer in the unit involved herein as their representative for purposes of collective bargaining, and that pursuant to Section 9(a) of the Act as amended, the said organization is the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment.

Dated at Baltimore, Maryland this 27th day of September, 1968.

Original signed by:
JOHN A. PENELLO,
Regional Director
National Labor Relations Board,
Region 5
1019 Federal Building, Charles Center
Baltimore, Maryland 21201

(65117 EVDD8

162956 (15015 MBCCH415436
RAAUIJHZ RUEVDE1.0004 2991635-UUUU—RUEVDD8.
FM ROBERT VOLGER ASSOC EXEC SEC'Y WASH DC NLRB

TO RUEVDD8/1/NLRB REG. 5, ATT: JOHN PENNELLO, BALTIMORE, MD.
BT.

RE: E. V. WILLIAMS COMPANY, INC. 5-RC-6351. IT IS HEREBY ORDERED THAT THE EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE BE, AND IT HEREBY IS, DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW. BY DIRECTION OF THE BOARD:

BT

NNNN

(65117 EVDD8-
10:25 P. M. 10-25-68

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1043

E. V. WILLIAMS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 432 F.2d 557. The Board decision and order in the unfair labor practice case (Pet. App. 2a-6a)[1] are reported at 175 NLRB No. 134. The decisions in the related representation case are set forth in Pet. App. 6a-21a.

---

[1] Only portions of the Trial Examiner's decision are set forth at Pet. App. 4a-6a. The full text is set forth at A. 209-226. ("A." refers to the appendix to the briefs filed in the court of appeals.)

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1970. The petition for a writ of certiorari was filed on December 2, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly sustained the union's challenges to the ballots cast by ten college students in a representation election without holding an evidentiary hearing.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> • • • •
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

On March 20, 1968, Laborers' District Council of Virginia, Local 307, and International Union of Operating Engineers, Local 147, filed a petition for a rep-

resentation election among the employees of the Company, a road contractor (Pet. App. 6a-8a). After a hearing, the Board's Regional Director directed an election, finding it appropriate to apply the Board's usual eligibility standard, under which workers employed during the payroll period immediately preceding the date of the direction of election would be eligible (Pet. App. 9a-12a, and n. 5).[4] The election results were 142 votes for the Union, 122 against, 29 challenged ballots,[5] and 2 void ballots (Pet. App. 13a).

The Regional Director investigated the status of the 10 college students whose ballots were challenged by the Union (n. 3, *supra*). He found that 9 of the students indicated when hired that they were returning to school; that 6 had completed at least a year of college; that none had plans to work for the Company the following summer, and none planned to work for it during the school year; and that only one had

---

[4] The Company had contended that, in view of the fluctuating nature of its operations, eligibility should extend to all employees who were employed for 30 days within the year preceding the eligibility date, and to those employed sometime during the preceding year and at least 45 days during the 2 years preceding the eligibility date (Pet. App. 9a, n. 5).

[5] The Unions challenged 16 ballots—6 on the ground that the voters were supervisors and 10 on the ground that the voters were students employed for the summer only. The Company challenged one ballot on the ground that the voter had been discharged prior to the election. The Board agent challenged 12 ballots on the ground that the voters' names did not appear on the eligibility list. (Pet. App. 14a.) The Company and the Unions agreed that 5 of the Board agent's challenges, and the Company's one challenge, should be sustained (Pet. App. 20a).

worked for the Company other than during the summer, and this occurred during his Christmas vacation from school (Pet. App. 14a-19a). On the basis of these facts, the Director concluded that the 10 students did not have any reasonable expectancy of permanent employment with the Company and did not possess a sufficient community of interest with the unit employees to be included in the unit;[1] he therefore sustained the Union's challenge to the 10 ballots (Pet. App. 19a). Since the remaining 13 challenged ballots were insufficient to affect the results of the election, which showed that the Unions had received a majority of the valid ballots, the Regional Director ordered that the Unions be certified as the collective bargaining representative of the Company's employees (Pet. App. 20a-21a).

The Company filed exceptions to the Regional Director's Decision and Certification with the Board. The Company contended that the Director had erred in sustaining the challenges to the 10 student ballots, for it was the customary practice of the Company to hire students during the summer months; about 10 percent of the Company's work force as of the election eligibility date consisted of students; and the students were paid the same rate prevailing among all employees for the particular jobs they were performing

---

[1] Under the Board's decisions, summer students are excluded from a bargaining unit unless they have a reasonable expectancy of future permanent employment; the mere expectancy of subsequent summer employment is not enough. *National Labor Relations Board* v. *Joclin Mfg. Co.*, 314 F. 2d 627, 634-635 (C.A. 2); *Brown-Forman Distillers Corp.*, 118 NLRB 484, 485.

(A. 173-174). The Board denied review on the ground that there were "no substantial issues warranting review" (Pet. App. 22a).

When the Company then refused to bargain, the Unions filed an unfair labor practice charge with the Board; the General Counsel of the Board issued a complaint on the charge, and, after the Company answered, moved for summary judgment; whereupon, the Trial Examiner ordered the Company to show cause why the General Counsel's motion should not be granted (A. 211-212). In its response, the Company attacked the validity of the certification, alleging that the Regional Director's investigation of the challenges to the student ballots had been inadequate and that the issue required an evidentiary hearing (A. 207-208). The Trial Examiner granted the General Counsel's motion for summary judgment, noting the settled Board policy not to allow relitigation of issues determined in representation proceedings absent newly discovered or previously unavailable evidence, which had not been presented here (Pet. App. 4a-6a; A. 216). The Board, affirming the Examiner, held that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Unions and ordered the Company, *inter alia*, to bargain with them on request. (Pet. App. 2a-3a, A. 222-A 224.)

The court of appeals, in a *per curiam* opinion, upheld the Board's decision and enforced its order. The court stated (Pet. App. 2a):

> The students were ruled ineligible to vote because they were temporary or casual summer employ-

ees lacking both reasonable expectancy of permanent employment with the company and sufficient community of interest to be included in the unit. We find that the Board neither committed procedural error nor abused its discretion in sustaining the challenge to the ballots * * *.

ARGUMENT

In the exercise of its broad discretion to determine the unit appropriate for collective bargaining and the employees eligible to vote in a representation election, the Board has concluded (see n. 4, *supra*) that summer students do not have a sufficient community of interest with other employees unless they have a reasonable expectancy not merely of future summer employment, but of forthcoming permanent employment. Petitioner does not appear to question the validity of this principle, but merely contends that the Board erred in applying it to the facts of this particular case. That is, petitioner contends that, since the Company employed 31 students, the Board should not have ruled on the status of the 10 to whom the Union objected without first affording the Company an evidentiary hearing for the purpose of adducing the facts as to the other students. Such an issue, which turns on the circumstances of this particular case, does not warrant further review. In any event, the Board acted properly in declining petitioner's request for a hearing on the status of the other student

employees.[4] No challenges had been filed to the votes cast by those students.[5]

---

[4] The petition does not present the issue involved in *Magnesium Casting Co.* v. *National Labor Relations Board*, No. 370, 1970 Term, and *Pepsi-Cola Buffalo Bottling Co.* v. *National Labor Relations Board*, 409 F.2d 676 (C.A. 2), certiorari denied, 396 U.S. 904—*i.e.*, whether the Board is required to review the record *de novo* before issuing an unfair labor practice order based on its regional director's representation determination. Both before the Board and the court of appeals, the Company merely contended that it was entitled to an evidentiary hearing on the challenges to the ten college students. As the Second Circuit recognized in *Pepsi-Cola*, the issue whether the Board is required to hold a hearing is quite distinct from the issue whether it is required to review *de novo* what its regional director has decided. 409 F.2d at 681-682.

[5] Nor is there substance to petitioner's contention that the Union, having agreed to an eligibility list which included the college students, was precluded from later challenging them. An agreement between the parties as to voter eligibility is not binding, where, as here, it does not conform to Board or statutory policy. *Hood Corp.*, 147 NLRB 378, 374, n. 2.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COMEN,
Assistant General Counsel,

LINDA SHER,
Attorney,

National Labor Relations Board.

JANUARY, 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 O 412016 424